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NO. 81-43

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ANNIE RAY ODOM,

PETITIONER,

VS.

STATE OF NORTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

COUNSEL FOR PETITIONER:

Seavy A. Carroll
115 South Cool Spring Street
Fayetteville, N.C. 28301
Telephone: (919) 483-9202

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ Term, 1981

ANNIE RAY ODOM,
Petitioner,

vs.

STATE OF NORTH CAROLINA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE
SUPREME OF THE UNITED STATES:

Petitioner, Annie Ray Odom, by counsel, Seavy A. Carroll, respectfully prays that a writ of certiorari issue to review the decision of the North Carolina Supreme Court entered on May 5, 1981.

QUESTION PRESENTED FOR REVIEW

Whether the admission of evidence that petitioner refused to submit to a gunshot residue test when she had been given the Miranda warnings and had told police officers that she would not take the test until she talked with a lawyer violated defendant's right to counsel and deprived her of due process of law.

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OPINIONS BELOW

The decision below by the North Carolina Supreme Court, 277 S.E. 2d 352 (1981) entered on May 5, 1981, reversed and remanded the decision of the North Carolina Court of Appeals, 49 N.C. App. 278, 271 S.E. 2d 98 (1980), which had granted defendant new trial.

JURISDICTION

The opinion of the Supreme Court of North Carolina was entered on May 5, 1981. This petition for certiorari was filed within sixty (60) days of that date, as prescribed by S. Ct. R. 20.1 (1980). This Court's jurisdiction is invoked under S. Ct. R. 17.1 (c). The Supreme Court of the State of North Carolina has decided an important question of federal law which has not been, but should be, settled by this Court, and has decided a federal question in a way in conflict with applicable decision of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval

forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

U.S. Constitution, Amendment VI:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

U.S. Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and

of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner was arrested without a warrant on the evening of March 16, 1979, for the shooting of Robert Lee Moore. The shooting occurred between 6:30 and 7:00 p.m. At 9:30 p.m., the police arrived at defendant's home and began to question her about the shooting. Petitioner stated she knew about the fight that had preceded the shooting, but knew nothing about the shooting. She told the police she was not going to say anything else until she got in touch with her lawyer, although during the questioning she did sign a waiver of her miranda rights. The waiver included the following printed statement:

> "5. If you decide to make statements or answer questions now without a lawyer present, you will still have the right to stop making statements or answering questions at any time until you talk to a lawyer."

Subsequently, she refused to take a gunshot residue test. She was told the purpose was to determine if she had gunshot residue about her body, and that she did not have to take the test. She said she wouldn't take the test until she got in touch with her lawyer.

Over the objections of petitioner, the Court allowed the State to introduce testimony that petitioner refused the gunshot residue test, and the Court required the petitioner to answer cross-examination questions from the State about her refusing to take the gunshot residue test.

Petitioner appealed the Superior Court judgment to the North Carolina Court of Appeals, which ordered the case remanded to the Superior Court for new trial, finding that the petitioner's rights under the Fourteenth Amendment

to the United States Constitution were violated, because of the State's solicitation at the trial of evidence concerning defendant's refusal to submit to the Paraffin test before consulting her attorney. That was a 2 to 1 decision which was appealed by the State.

The petitioner first raised the Federal question - about her right to exclude evidence solicited by the State in the Superior Court trial. On page 47 of the Statement of Case on Appeal, petitioner was being cross-examined:

> "Q. You did not let them perform the gunshot residue test on your hands, did you?
>
> Mr. Carroll: Objection.
>
> Court: Overruled
>
> Exception: This is Defendant's Exception No. 2.
>
> A. No, sir, because I told him after he spoke to me at my house before he even left my house that I wasn't going to say anything else until I got in touch with my lawyer."

On page 74 of the Statement of Case on Appeal, CRIME SCENE TECHNICIAN, CHRIS BRAMI, was allowed to testify for the State as follows:

> "Q. Did the defendant permit you to perform the gunshot residue test?
>
> Mr. Carroll: Objection.
>
> Court: Overruled.
>
> Exception: This is Defendant's exception No. 11.
>
> A. She did not. She did not want me to perform it."

These exceptions were argued in the North Carolina Court of Appeals, and were argued in the North Carolina Supreme Court, citing the violations of the Fifth and Fourteenth Amendment Rights. Related to the entire matter is the violation of the Petitioner's Sixth Amendment Rights - the right to have assistance of counsel for her defense.

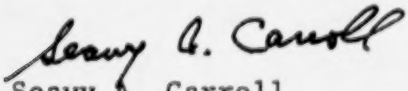
REASON FOR GRANTING THE WRIT OF CERTIORARI

Petitioner's constitutional rights were violated when the Court allowed evidence to be elicited to show that she had refused to take the gunshot residue test. The North Carolina Supreme Court decision against the petitioner is contrary to opinion in Doyle v. Ohio, 426 U.S. 610.

CONCLUSION

Based on the foregoing, the Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,



Seavy A. Carroll
Attorney for Petitioner
115 South Cool Spring Street
Fayetteville, N.C. 28301
(919) 483-9202

APPENDIX
A

NORTH CAROLINA COURT OF APPEALS
No. 8012SC289
Filed: 21 October, 1980

STATE OF NORTH CAROLINA

vs.

Cumberland County
No. 79 CRS 39480

ANNIE RAY ODOM

Appeal by defendant from Preston, Judge. Judgment entered 18 October 1979 in Superior Court, Cumberland County. Heard in the Court of Appeals 9 September 1980.

Defendant was arrested without a warrant on the evening of 16 March 1979 for the shooting of Robert Lee Moore. The shooting occurred between 6:30 and 7:00 p.m. At 9:30 p.m., the police arrived at defendant's home and began to question her about the shooting. Defendant stated she knew about the fight that had preceded the shooting, but knew nothing about the shooting. Defendant told the police she was not going to say anything else until she got in touch with her lawyer, although at some point during the questioning she did sign a waiver of her Miranda rights.

After the preliminary questioning, defendant was taken to the Law Enforcement Center in Fayetteville. At her initial appearance, while standing before the magistrate, defendant was asked if she would submit to a gunshot residue

test, otherwise known as a paraffin test. It was explained to defendant that the test would show whether there was any gunpowder residue on her hands. Defendant refused to take the test until she had spoken with her lawyer.

Subsequently, defendant was charged in a proper bill of indictment with assaulting Robert Moore "with a deadly weapon, to wit: a gun, with intent to kill the said Robert Moore, inflicting serious bodily injury" and was tried in superior court. The prosecution asked defendant on cross-examination whether she had refused to take the paraffin test. Defendant's counsel objected; but after an extensive voir dire, the State was allowed to question defendant concerning her refusal to submit to the gunshot residue test.

Defendant was found guilty of assault with a deadly weapon inflicting serious

bodily injury and was sentenced to not less than five nor more than seven years in the Department of Correction for Women. Defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Acie L. Ward, for the State.

Seavy A. Carroll for defendant appellant.

HILL, Judge.

Defendant first argues that it was a violation of her Fifth and Fourteenth Amendment rights to allow the State to question her and one other witness concerning her refusal to submit to the paraffin test. Defendant further argues that the trial court erred when it permitted the State to cross-examine her about a fight she had with State's witness Nancy Ezell the day prior to Robert

Moore's shooting. After due consideration, we find both arguments to be without merit.

Although defendant has not raised the issue, we do find, however, that the State's solicitation at trial of evidence concerning defendant's refusal to submit to the paraffin test before consulting with her attorney violated her rights under the Fourteenth Amendment to the United States Constitution and under Article I, Section 19 of the North Carolina Constitution.

In the case sub judice, the State neither compelled defendant to submit to a non-testimonial identification proceeding nor introduced physical evidence of defendant's guilt. Rather, the State introduced evidence from which the jury could reasonably imply that defendant's refusal to submit to a paraffin test

until she had consulted with her attorney constituted a "statement" by defendant, inconsistent with her plea of not guilty.

Defendant's refusal to submit to the test until she could speak with her attorney came only after the arresting officers told her that she had a right to consult an attorney. It would appear, therefore, that the defendant relied on the statements of the officers when she requested the opportunity to consult with retained counsel prior to submitting to the test. We find that it would be fundamentally unfair and a violation of defendant's federal and state constitutional rights to allow the State to use her request to consult with an attorney, made in reliance on the State's declaration of her right, as an implication of defendant's guilt.

We are persuaded, in reaching our decision, by the reasoning in Doyle v. Ohio, 426 U.S. 610, 49 L.Ed. 2d 91, 96

S.Ct. 2240 (1976), and in State v. Lane, 46 N.C. App. 501, 265 S.E. wd 493 (1980). In each of those cases, defendant exercised his right to remain silent during custodial interrogation and did not give his explanation of exculpatory circumstances until his trial. The prosecution in each case argued that if defendant were not guilty he would have asserted his alibi defense prior to trial. The courts granted the defendants new trials and found that it would be "fundamentally unfair and a deprivation of due process" to allow the prosecution to use defendant's reliance on his right to remain silent to impeach defendant's assertion of innocence. Doyle, 426 U.S. at 618, 49 L.Ed. 2d at 98.

Ms. Odom, like the defendants in Doyle and Lane, merely exercised what she had been told, and believed to be, her right to consult with an attorney

when she refused to submit to the paraffin test. We are concerned by such a situation where the State tells the defendant upon arrest that she has a right to see her lawyer, the defendant justifiably relies on that assertion, and the State then uses defendant's reliance on her perceived right as an affirmative inference of guilt. We find that such practice violates defendant's due process rights under the United States and North Carolina Constitutions.

We further find the State's violation of defendant's due process rights to have been prejudicial.

> A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable coubt, that the error was harmless.

G.S. 15 A-1443(b). Also see Chapman v.

California, 386 U.S. 18, 24, 17 L.Ed. 2d 705, 710-11, 87 S.Ct. 824; reh. denied 386 U.S. 967 (1967).

The State's evidence tends to show that defendant shot Robert Moore. The defendant took the stand and denied her guilt, but the credibility of the denial was lessened when the State pointed out that defendant refused to take a test that could have conclusively proven her innocence. This Court cannot find that the State has demonstrated beyond a reasonable doubt that the improper impeachment of defendant's denial was not prejudicial.

The case must be remanded for a new trial.

New Trial.

Judge WHICHARD concurs.

Judge HEDRICK dissents.

HEDRICK, Judge dissenting:

I am unwilling to extend the principle enunciated in Doyle v. Ohio, 426 U.S. 610, 49 L.Ed. 2d 91, 96 S.Ct. 2240 (1976), to say that the trial judge committed error in allowing the State to introduce evidence concerning defendant's refusal to take a paraffin test because she did not have her lawyer present. Assuming, arguendo, that any error was committed with reference to such evidence, I am satisfied that under the circumstances of this case, such error was harmless beyond a reasonable doubt. I would vote to hold that defendant had a fair trial free from prejudicial error.

APPENDIX
B

IN THE SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1981

STATE OF NORTH CAROLINA

vs.

No. 4 - Cumberland
(Filed May 5, 1981)

ANNIE RAY ODOM

On appeal as a matter of right pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, 49 N.C. App. 278, 271 S.E. 2d 98 (1980), one judge dissenting, ordering a new trial for defendant. The trial proceedings were held before

Judge Preston at the 15 October 1979 Criminal Session of Superior Court, Cumberland County.

The question presented by this appeal is whether the admission of evidence that defendant refused to submit to a gunshot residue test when she had been given the Miranda warnings and had told police officers that she would not take the test until she talked with a lawyer violated defendant's right to counsel and deprived her of due process of law.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Acie L. Ward, for the State.

Seavy A. Carroll for defendant-appellee.

CARLTON, Justice.

I.

On 16 March 1979 defendant was arres-

ted for shooting Robert Lee Moore and was charged with assault with intent to kill, inflicting serious bodily injury. She was informed by the arresting officers of her Miranda rights and signed a written waiver of them. In response to the officers' questions, defendant conceded that she knew something about a fight in which she and the victim were involved earlier in the day but denied any knowledge of the shooting. At this point, she informed the officers that she wished to consult with her attorney, and the questioning was stopped.

Before defendant talked to her attorney, she was taken before a magistrate and was asked to take a gunshot residue test.[1] A crime scene technician explained

---

[1]The officers did not procure a nontestimonial identification order, nor did they follow the procedures set out in Article 14, Chapter 15A of our General Statutes, G.S. §§ 15A-271 to -282 (1978).

to defendant that the test would show whether she had recently fired a weapon. Defendant refused to take the test until she talked with her lawyer. The technician then told her that she did not have to take the test, and the test was never administered.

At her trial in superior court, the State presented two eyewitnesses, including the victim, who testified that defendant was the person who shot Robert Lee Moore. Defendant testified that she had seen the victim on the day in question at the scene of the shooting but that no one was shot while she was there. On cross-examination the State asked defendant whether she had refused to take a gunshot residue test. Defendant objected, and, after a lengthy voir dire, the trial judge overruled her objection and allowed the State to elicit from defendant her refusal to take the test

until she talked to her attorney. On rebuttal, Officer Brami, the crime scene technician, testified over defendant's objection that defendant refused to take the test.

The jury returned a guilty verdict and defendant was sentenced to five to seven years.

On appeal, the Court of Appeals reversed her conviction and ordered a new trial, on the basis of Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), and State v. Lane, 46 N.C. App. 501, 265 S.E. 2d 493, aff'd, 301 N.C. 382, 271 S.E. 2d 273 (1980), stating, "We find that it would be fundamentally unfair and a violation of defendant's federal and state consitutional rights to allow the State to use her request to consult with an attorney, made in reliance on the State's declaration of her right, as an implication of defendant's guilt." 49 N.C. App. at 280, 271 S.E.

2d at 100. Judge Hedrick dissented, claiming that the decision represented an unwarranted extension of Doyle and Lane and arguing that the error, if any, in admitting the testimony was harmless beyond a reasonable doubt.

II.

The issue in this case has been presented to us as one involving defendant's constitutional right to be represented by counsel in state criminal prosecutions and her right to due process of law. Stated specifically, the issue presented by the parties is whether defendant's constitutional rights were denied when, over her objection, evidence was admitted that she had refused to submit to a gunshot residue test until she talked with her attorney. For the reasons stated below, we hold that defendant's constitutional rights were not violated by the admission of such evidence

and, accordingly, we reverse the Court of Appeals.

A.

Our first inquiry is whether the admission of testimony concerning defendant's refusal to take the gunshot residue test violated her right to counsel, guaranteed by the sixth, by virtue of the fourteenth, amendment to the United States Constitution, Gideon vs. Wainright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), and by Article I, Sec. 23 of the Constitution of North Carolina. Defendant urges that her right to counsel has been violated and cites in support of her contentions our recent decision in State v. Lane, 301 N.C. 382, 271 S.E. 2d 273 (1980).

In Lane, the prosecutor was allowed to question defendant about his failure to inform the police, after his arrest, of his

alibi defense to a charge of selling heroin to an undercover narcotics officer. We found that this questioning violated defendant's right to remain silent and reversed his conviction. Lane stands for the proposition that comment by a prosecuting attorney at trial upon defendant's post-arrest silence, as a general rule, is constitutionally impermissible.[2]

---

[2] Lane, does, however, recognize an exception to this rule: the prior inconsistent statement. This arises when defendant's silence amounts to a contradiction of his testimony at trial and occurs on when, at the time of defendant's silence, it would have been natural for him to speak and give the substance of his trial testimony. State v. Lane, 301 N.C. at 385-86, 271 S.E. 2d at 275-76; cf. Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971) (use of prior inconsistent statement made prior to giving of Miranda warnings to impeach defendant's credibility is constitutionally permissible); 3 A. Wigmore, Evidence § 1042 (Chadbourn rev. 1970) (when silence amounts to an inconsistent statement). Comment upon defendant's pre-arrest silence has been held to violate neither the fifth amendment right to remain silent nor the fourteenth amendment due process clause. Jenkins v. Anderson, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980).

Although Lane, because it concerns the right to remain silent, does not specifically apply to this case, we think it controlling by analogy. Under the authority of Lane, comment upon an accused's post-arrest exercise of his or her constitutional right to counsel is, as a general rule, impermissible. Thus, if in refusing to take the gunshot residue test defendant was relying on her constitutionally guaranteed right to counsel, the admission of testimony concerning that subject was error and her conviction must be reversed.

Although a defendant is granted a general right to counsel to assist in his or her defense, that right does not attach to all events leading to trial. The right attaches only to "critical" states of the proceedings, those proceedings where the presence of counsel is necessary to assure a meaningful defense. United States v.

Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). In deciding whether a particular proceeding constitutes a critical stage, courts must focus their inquiry on "whether the presence of . . . counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." Id. at 227, 87 S. Ct. at 1932, 18 L. Ed. 2d at 1157.

Although the United States Supreme Court has never considered whether a gunshot residue test is a critical stage in the proceedings, it has indicated that the gathering of evidence through the use of scientific tests and analyses, such as finger-printing, blood tests and tests performed on the clothing and hair, are not such stages. Id. at 227, 87 S. Ct.

at 1932-33, 18 L.Ed. 2d at 1158; Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L. Ed. 2d 1178 (1967) (taking of handwriting samples not a critical state of the proceedings); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966) (sixth amendment right to counsel does not attach to giving of blood test).

> Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and presentation of the evidence of his own experts.

388 U.S. at 227-28, 87 S. Ct. at 1932-33, 18 L. Ed. 2d at 1158. We are unable to perceive any difference in the giving of a gunshot residue test that would require the presence of counsel to protect defendant's rights at trial. Thus, we hold that the administration of a gunshot

residue test is not a critical stage of the criminal proceedings to which the constitutional right to counsel attaches and that defendant's right to counsel was not violated by the admission of the challenged testimony.

B.

We now turn to a consideration of whether defendant's right to due process of law has been denied.

In Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), the Supreme Court held that defendants' due process rights had been violated by the use, for impeachment purposes, of their silence at the time of arrest and after the Miranda warnings had been given. The rationale for this decision lay in the assurance implicit in the Miranda warnings that a defendant's exercise of his right to remain silent would not be used against

him at trial. Id. at 619, 96 S. Ct. at 2245, 49 L. Ed. 2d at 98.

The importance of the giving of the Miranda warnings was underscored in the recent case of Jenkins v. Anderson, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86. The defendant in Jenkins was cross-examined at trial about his pre-arrest silence concerning his defense of self-defense. In affirming his conviction, the Supreme Court reasoned:

> [N]o governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and given Miranda warnings. Consequently, the fundamental unfairness present in Doyle is not present in this case. We hold that impeachment by use of prearrest silence does not violate the Fourteenth Amendment.

447 U.S. at 240, 100 S. Ct. at 2130, 65 L. Ed. 2d at 96.

In this case, defendant's refusal to

submit to the gunshot residue test took place after she had received, and signed a written waiver of, her Miranda rights. The giving of those rights implicitly assured her that she would not be penalized for exercising her constitutional right to counsel. Because no constitutional right to counsel is involved here and because no governmental action induced defendant to believe she had a constitutional right to have counsel present during the test, we conclude that the admission of evidence of her refusal to submit to the gunshot residue test is not fundamentally unfair and is not violative of due process.[3]

---

[3]We note that defendant did have a statutory right to have counsel present during the test by virtue of G.S. 15A-279(d)(1978). Neither party argued this point. While defendant's statutory right may have been violated in this case by the admission of the testimony, defendant has not met her burden of showing that the error was prejudicial in light of the very strong case against her, i.e., that, absent the contested evidence, a different result would likely have ensued, State v. Daye, 281 N.C. 592, 597, 189 S.E. 2d 481, 483 (1972).

III.

In conclusion, we hold that the admission of testimony concerning defendant's refusal to submit to the gunshot residue test did not violate her constitutional right to counsel and did not deprive her of due process of law. Accordingly, the decision of the Court of Appeals is reversed, and this cause is remanded to that Court with instructions to remand to the Superior Court, Cumberland County, for reinstatement of the jury verdict.

Reversed and Remanded.

CERTIFICATE

In accordance with Rule 33 of the Rules of the Supreme Court of the United States, I hereby certify that I have this the 3rd day of July, 1981, filed the required copies of Petitioner's petition for Writ of Certiorari in the Clerk's Office in Washington, D.C. and have mailed the required copies of said petition for Writ of Certiorari to John R. B. Matthis, Special Deputy Attorney General, N.C. Department of Justice, P.O. Box 629, Raleigh, N.C. 27602 - and to Michael DeSilva, Assistant District Attorney, New Cumberland County Courthouse, 117 Dick Street, Suite 237, Fayetteville, N.C. 28301.

Seavy A. Carroll
Attorney for Petitioner

No. 81-43

Office-Supreme Court, U.S.
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OCT 20 1981
ALEXANDER L. STEVAS,
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OCTOBER TERM, 1981

ANNIE RAY ODOM,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RUFUS L. EDMISTEN
Attorney General of
North Carolina

John R. B. Matthis
Special Deputy Attorney General
COUNSEL FOR RESPONDENT
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-7741

Philip A. Telfer
Associate Attorney General

DI CESARE - Printing — 331-6101 — Washington, D.C. 20006

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THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the North Carolina Supreme Court is reported at 303 N.C. 163, 277 S.E.2d 352 (1981). The opinion of the North Carolina Court of Apeals is reported at 49 N.C App. 278, 271 S.E.2d 98 (1980). Copies of the opinions of the North Carolina Supreme Court and Court of Appeals are appended to the Petition. (Pet. Br. 10-34).

JURISDICTION

Petitioners allege jurisdiction pursuant to U.S. Sup. Ct. R. 17.1 (c).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

U.S. Constitution, Amendment VI:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

U.S. Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

DID THE TESTIMONY ADMITTED BY THE TRIAL COURT REGARDING DEFENDANT'S REFUSAL TO SUBMIT TO A GUNSHOT RESIDUE TEST (THE PARAFFIN TEST) VIOLATE HER CONSTITUTIONAL RIGHTS TO COUNSEL AND DUE PROCESS OF LAW?

STATEMENT OF THE CASE

On March 16, 1981 Defendant was arrested for shooting Robert Lee Moore and was charged with assault with intent to kill, inflicting serious bodily injury. Defendant was informed by the arresting officers of her *Miranda* rights and signed a written waiver of them. In response to the officers' questions, Defendant conceded that she knew something about a fight in which she and the victim were involved earlier in the day, but denied any knowledge of the shooting. She informed the officers at this point that she wished to consult with counsel and questioning ceased.

Defendant was taken before a magistrate and there was asked to take a gunshot residue test. A crime scene technician explained to the Defendant that the test would show whether she had recently fired a weapon. Defendant refused to take the test. The technician then

told her that she did not have to take the test, and the test was never administered.

At trial two eyewitnesses, including the victim, testified that the Defendant shot Robert Lee Moore. Defendant testified she had seen the victim on the day in question, at the scene of the shooting, but that no one was shot while she was there. She further testified that she owned a gun which she had placed in her daughter's car that morning when she drove it, that the car was at the scene of the shooting, and that she first discovered the gun missing when the police searched the car.

On cross-examination Defendant testified, over objection, that she had refused to take the paraffin test until she talked to her attorney. The crime scene technician who had explained the test to the Defendant testified as a rebuttal witness, over objection, concerning Defendant's refusal to take the test. The technician confirmed that the Defendant had refused to take the paraffin test, but stated he did not recall Defendant giving any reason for the refusal.

The jury found the Defendant guilty and she was sentenced to a term of five to seven years. Petitioner appealed her conviction and was awarded a new trial by the North Carolina Court of Appeals. The Supreme Court of North Carolina reversed, finding no Consitutional violation.

ARGUMENT

NEITHER PETITIONER'S RIGHT TO COUNSEL NOR HER DUE PROCESS RIGHTS WERE VIOLATED BY THE TRIAL COURT'S ADMISSION OF TESTIMONY REGARDING HER REFUSAL TO SUBMIT TO A GUNSHOT RESIDUE TEST.

Petitioner had no right to the presence of counsel during the administration of a gunshot residue test. As there was no Constitutional right violated by the State's request that the Defendant take such a test, there is no due process violation in the admission of testimony regarding such refusal.

The rulings of this Court make it clear that Petitioner had no right to counsel during the administering of a gunshot residue test. As the North Carolina Supreme Court pointed out in its opinion, the right to counsel:

> attaches only to "critical' stages of the proceedings, those when the presence of counsel is necessary to assure a meaningful defense. *United States v. Wade*, 338 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). In deciding whether a particular proceeding constitutes a critical stage, courts must focus their inquiry on "whether the presence of counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." *Id.* at 227, 87 S.Ct. at 1932, 18 L.Ed.2d at 1157.

303 N.C. at 166, 277 S.E.2d at 355, Pet. Br. at 28-29.

This Court's decisions establish that the conduct of scientific tests which result in non-testimonial evidence against the Defendant are not "critical stages" in the proceedings to which the right to counsel would attach. *Wade*,338 U.S. at 227, 87 S.Ct. at 1932-33, 18 L.Ed.2d. at 1158; *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d. 908 (1966). Clearly, then, since Defendant's right to counsel would not have been violated by the State's administering of a paraffin test, no violation of that right could have been committed in the *request* to take such a test. Thus, any reliance of Petitioner on the right to counsel in refusing to take the test was misplaced; no such Constitutional right exists and no governmental official had informed her or led her to believe that it did.

Petitioner, nonetheless, asserts that admission of testimony regarding refusal to take a gunshot residue test was fundamentally unfair and violated her Fourteenth Amendment due process rights. In support of her position, Petitioner relies on this Court's opinion in *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 48 L.Ed.2d. 91 (1976). *Doyle* is inapposite.

In *Doyle* this Court held that where Petitioners had failed to relate to the arresting officers their exculpatory story after *Miranda* warnings had been given, but first raised that defense at trial, the trial court's allowance of cross-examination concerning their silence following arrest was fundamentally unfair and in violation of the due process clause of the Fourteenth Amendment. In the Court's view, allowance of cross-examination concerning post-arrest silence would result in the

chilling of a defendant's exercise of Constitutional rights. This was true, the Court stated, despite the fact that the *Doyle* defendants had not asserted that their silence was based on the *Miranda* rights which had been read to them.

Petitioner in the case at bar asks this Court to extend *Doyle* to a situation where she had neither a Constitutional right to counsel nor to refuse to submit to the paraffin test. More on point than *Doyle* to the present case is *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980). In *Jenkins* this Court held that cross-examination of a Defendant concerning pre-arrest silence did not amount to fundamental unfairness in violation of Defendant's due process rights. This Court distinguished *Doyle* on the basis that no Constitutional right to remain silent had attached prior to the arrest.

> In this case, no governmental action induced Petitioner to remain silent before arrest. The failure to speak occurred before the Petitioner was taken into custody and given *Miranda* warnings. Consequently, the fundamental unfairness present in *Doyle* is not present in this case. We hold that impeachment by use of pre-arrest silence does not violate the Fourteenth Amendment.

447 U.S. at 240, 100 S.Ct. at 2130, 65 L.Ed2d. at 96.

As Petitioner neither had nor was led to believe that she had either the right to refuse to take the gunshot residue test or the right to have counsel present during the administration of such a test, there was no fundamental unfairness in the trial court's admission of testimony concerning Petitioner's refusal to take such a test.

CONCLUSION

Based on the foregoing, the Resondent prays that the writ of certiorari be denied.

This the 20th day of October, 1981.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

John R. B. Matthis
Special Deputy Attorney General
Counsel for Respondent
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-7741

Philip A. Telfer
Associate Attorney General

CERTIFICATE OF SERVICE

This is to certify that the foregoing Response to Petition for Discretionary Review was served upon the Defendant by placing three copies of said Response to Petition for Discretionary Review in The United States post Office at Raleigh, North Carolina, with first class postage prepaid and addressed to:

Seavy A. Carroll
115 South Cool Spring Street
Fayetteville, North Carolina 28301

This the 20th day of October, 1981.

John R. B. Matthis
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-7741